Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| Implementation of the Local | ) | CC Docket No. 96-98 |
| Competition Provisions of the | ) | |
| Telecommunications Act of 1996 | ) | |

# COMMENTS OF QWEST CORPORATION IN RESPONSE TO PUBLIC NOTICE

Sharon J. Devine
Robert B. McKenna
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Attorneys for

QWEST CORPORATION

April 5, 2001

TABLE OF CONTENTS

## SUMMARY

In the January 20, 2000 Public Notice to which these comments respond, the Commission requests further information on what is known as "circuit flipping," the practice whereby a CLEC is able to arbitrage between an ILEC's tariffed high capacity special access service price and the less expensive UNE-based price for the identical special access circuit (The issue here is limited to circumstances where a CLEC desires to have an intact special access circuit (loop plus transport) flipped intact to UNE prices by the ILEC. Under current rules a CLEC may combine a UNE loop with UNE transport at its collocation space. The instant proceeding does not address this issue). The practice has become known as circuit flipping because, in practically all cases, the circuit is already in place, having been purchased earlier under tariff by the CLEC. Generally circuit flipping entails nothing more than a billing change. Currently a high capacity special access circuit can only be flipped, or converted, to a UNE price when the CLEC certifies that the circuit is used to carry a substantial amount of local exchange traffic. A special access circuit used to provide exchange access or long distance service is not eligible to be flipped to a UNE price, and must continue to be purchased at the tariff rate.

In these comments Qwest observes that the high capacity special access market is intensely competitive, and that carriers, large business users and CLECs, the purchasers of high capacity special access, have a wealth of alternatives available. It is very clear that no CLEC will be impaired in its ability to provide special access or long distance service if it is unable to purchase an ILEC special access circuit at UNE prices. Accordingly, as a CLECs ability to provide special access or long distance service will not be materially impaired by its inability to flip high capacity special access services to a UNE circuit in order provide special access or long

distance service, a CLEC's desire to flip special access circuits for this purpose is precluded by Section 251(d)(2)(B) of the Communications Act.

These comments also address several other items of note:

- The reason for the disparity in price between Qwest's tariffed special access circuits and the TELRIC price for these circuits lies in a flaw in the TELRIC methodology when applied to new technology which is not deployed immediately across the range of demand. Qwest's special access circuits are priced at competitive levels.
- There is ample legal authority for ILECs to decline to flip special access circuits to UNEs when the circuits are used for exchange access and long distance purposes. In fact, directing ILECs to make such "UNEs" available would contravene the language of the Telecommunications Act.
- "Commingling," the practice of requiring an ILEC to connect an ILEC tariffed service to a UNE, would violate the fundamental difference between tariffed services and UNEs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| Implementation of the Local | ) | CC Docket No. 96-98 |
| Competition Provisions of the | ) | |
| Telecommunications Act of 1996 | ) | |

# COMMENTS OF QWEST CORPORATION IN RESPONSE TO PUBLIC NOTICE

Qwest Corporation ("Qwest") hereby files its initial comments in response to the Federal Communications Commission's ("Commission" or "FCC") January 24, 2001 Public Notice[1] requesting additional comments in the above-captioned docket on the subject of what is called "circuit flipping."

## I. INTRODUCTION

At issue in this proceeding is whether the FCC should, or can, direct incumbent local exchange carriers ("ILEC") to "flip" to unbundled network element ("UNE") prices, existing special access circuits (loop-transport combinations) purchased pursuant to Qwest's interstate and intrastate tariffs and used by competitive local exchange carriers ("CLEC") to provide exchange access service and by interexchange carriers ("IXC") to provide long distance service. UNE prices are the prices established for UNEs ordered by carriers pursuant to Section 251(c) of the 1996 Telecommunications Act (the "Act"). Another way of stating the issue is whether the FCC should or can permit the unbundling provisions of Section 251(c) of the Communications Act to deteriorate into a pure arbitrage device through the CLEC use of ILEC tariffed circuits

[1] Public Notice, CC Docket No. 96-98, DA 01-169, rel. Jan. 24, 2001, Public Notice granting an extension of time for filing comments and reply comments, DA 01-501, rel. Feb. 23, 2001.

priced at UNE rates to provide exchange access service. There is no legal, factual or policy basis on which to direct such action. While Qwest's comments will focus on the relatively narrow issue of how to treat special access and private line circuits which do not carry a substantial amount of local exchange traffic, it is important that the Commission not lose sight of the broader context in which the circuit flipping issue arises.

This context is marked by the dramatic increase in competition in the high-capacity marketplace,[2] the marketplace in which the major customers are IXCs and large business customers. A new document introduced for the first time on the record in this proceeding today, a Report on Competition for Special Access Service, High Capacity Loops, and Interoffice Transport,[3] illustrates dramatically just how competitive the high-capacity marketplace is today. Large business customers have a wealth of competitive high-capacity telecommunications choices available in almost every location. IXCs, the largest of which are affiliated with the largest competitive access providers, have very little difficulty choosing an alternative to incumbent LEC special access services. There are multiple suppliers of special access service, prices are competitive, and competitors are constantly making investment which increases this panoply of competition and customer choice. It would be quite wrong for the Commission to examine the current high-capacity marketplace with the preconceived notion that something must be done by regulators to encourage and nurture competition in that market. Additional regulatory action can be justified only upon a strong factual record. Competition is flourishing today.

---

[2] We will use the terms "high-capacity marketplace" and "special access marketplace" interchangeably herein.

[3] Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport ("Special Access Report"). This Report has been submitted on the record today by the United States Telecom Association, and is referenced herein.

The extent of competition in today's high-capacity marketplace is well documented by the economic evidence of record, most recently the Special Access Report. But this competitive reality is also demonstrated indirectly by the fact that even those who claim that they have the right to demand that their existing special access circuits be repriced as "UNEs" make no effort to demonstrate that their ability to provide special access or long distance service is in any material way impaired by their inability to reprice these circuits. This inability is hardly surprising -- after all, the entities requesting that their special access circuits be "flipped" to UNE or TELRIC prices are currently using exactly the facilities they wish to have "flipped" to UNE prices. They are paying the tariffed rates for the facilities but they are using them today to provide service. No one seriously argues that the statutory impairment test is met in the case of these circuits. The sole argument utilized to justify the "flipping" of special access circuits to UNE prices for purposes of providing special access or private line services is not based on an impairment analysis, but rather is based on the claim that purchasers of high-capacity special access circuits are entitled to the reduced rates which UNE status entails because the Act supposedly entitles carriers to use a UNE for any purpose once it has been purchased. This argument is untrue, and the market for high-capacity services has reached the point of competition where it is not possible to even seriously argue that the failure of a carrier, IXC or competitive LEC, to obtain access to a special access circuit at UNE prices for the provision of non-local exchange service will impair the ability of the carrier to provide the service for which the UNE is requested.

## II. THE PROCEEDING AT HAND COVERS ONLY THE LIMITED ISSUE OF "FLIPPING" SPECIAL ACCESS CIRCUITS WHICH DO NOT CARRY LOCAL EXCHANGE TRAFFIC FROM TARIFFED PRICES TO UNE PRICES

The evidence on the record in this proceeding documents that the marketplace for high-capacity services is highly competitive, and this evidence merits serious consideration when the FCC next examines the overall high-capacity regulatory structure. While the nature of the instant proceeding is considerably more limited, it is important that the Commission recognize that the nature of this market forms the predicate for accurate assessment of the correct application of the Act's "impairment test" here as well as in other contexts in the future. Several brief observations about the scope of this particular proceeding are appropriate.

This stage of the Local Competition Docket deals with what are called high-capacity special access or private line services.[4] Special access services are point-to-point communications services, consisting (simplistically) of two channel terminations linking the two end points of a circuit to the nearest wire center, and, where appropriate, channel mileage between wire centers. Multiplexing and other features are also commonly part of special access services. Interstate special access offered by Qwest is generally a service that links the premises of a large business customer to an IXC's point of presence (or "POP"), and consists of the same channel termination/channel mileage/channel termination configuration (although the link between a LEC wire center and the IXC's POP is sometimes called an "entrance facility"). Qwest's intrastate private line circuits, generally configured in the same fashion, customarily serve large business customers by providing them with point-to-point communications capabilities among several premises. Qwest offers special access and private line circuits both as

[4] Unless context otherwise requires, we will use the phrase "special access" to refer to tariffed high-capacity special access and private line services.

an ILEC, within its region, and as a CLEC, outside of its region. None of these services is considered to be within the definition of local exchange service or telephone exchange service.[5]

In a series of Orders in 1999 and 2000,[6] the FCC established some basic parameters for the use of special access circuits by competitive LECs to provide their own common carrier services.

- The ability of competitive LECs to purchase, at UNE prices, combinations of loops and transport to provide local exchange services is considered to be pro-competitive. Where such combinations are not currently available because of the manner in which incumbent LEC networks are constructed, incumbent LECs are not required to construct such combinations on behalf of a requesting competitive LEC.[7]
- Incumbent LECs must offer high-capacity loops as UNEs under the Commission's application of the "impairment test" as set forth in the Third Report and Order.[8] The same is true of high-capacity interoffice transport.[9] The ability of competitive LECs to purchase high-capacity loops or high-capacity transport is not an issue in this proceeding.

---

[5] *See, e.g.*, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147, *et al*., Order on Remand, 15 FCC Rcd. 385, 397-98 ¶ 26 (1999).

[6] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) ("Third Report and Order"); Supplemental Order, 15 FCC Rcd. 1760 (1999) ("Supplemental Order"); Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000) ("Supplemental Order Clarification").

[7] Third Report and Order, 15 FCC Rcd. at 3909 ¶ 480.

[8] Id. at 3781-82 ¶ 187.

[9] Id. at 3842 ¶ 321, 3842-43 ¶ 323, 3846 ¶ 332.

- A competitive LEC can combine its UNE high-capacity loops with its UNE high-capacity transport at its collocation space to create a complete circuit to be used for exchange access purposes. This ability is not at issue in this proceeding.
- Where a combination of loops and transport already exists, the incumbent LEC is prohibited from "disconnecting" the combination, and must leave it in place for requesting carriers when the combination is requested as a UNE, even though the incumbent LEC could refuse to combine the elements if they were not already combined.
- When the pre-existing combination of loops and transport has been used by the requesting competitive LEC to provide local exchange service, the above rules apply and the competitive LEC may request that the pre-existing circuit be converted from tariffed special access service to UNE prices.[10] If a circuit is used to carry a "substantial" amount of local exchange traffic, and the competitive LEC certifies to this effect, the circuit may be converted to a UNE under the Commission's rules. This conversion of a tariffed special access circuit to a UNE combination is known as "circuit flipping," because the service to the CLEC is identical in all respects except price.
- The Public Notice treats the situation which arises when a competitive LEC or an IXC seeks to convert or flip a pre-existing high capacity special access circuit purchased from the incumbent LEC pursuant to the incumbent LEC's special access tariff to a pre-combined UNE but the circuit is not used to provide local exchange service. In these circumstances, under the current rules, the incumbent LEC need not convert the circuit for the competitive LEC or the IXC. This type of conversion is the subject of the instant Public Notice -- whether the FCC should require that high-capacity special access circuits

purchased by competitive LECs or IXCs under tariff for the purpose of providing long distance service or exchange access service be made available to the CLEC or IXC at UNE prices. The Act does not envision that ILECs can be required to flip circuits for CLECs under these circumstances.

- Not only would circuit flipping in these circumstances contravene the Act, ordering that ILECs flip high capacity special access circuits would seriously undermine the purposes of the Act and the public interest. Because of the manner in which the Commission's Total Element Long Run Incremental Cost ("TELRIC") costing and pricing rules work, TELRIC pricing for high-capacity special access circuits generally results in a significant under-recovery of costs by the incumbent LEC. Even assuming that TELRIC costing is a valid method of pricing elements of a switched network within a local exchange,[11] when TELRIC is applied to high-capacity special access service the incumbent LEC's costs are not fully recovered. At current prices, TELRIC rates produce a price approximately one-half of the existing Qwest special access or private line price. This is true even though the Qwest special access and private line services are priced competitively in a competitive market. Qwest's special access prices are in line with the prices of Qwest's competitive LEC competitors.[12]
- So long as the Commission retains its rules prohibiting conversion of high-capacity circuits which are not used to provide local exchange service, this pricing problem does

[10] Qwest disputes the Commission's finding that such conversion meets the impairment test, but is not seeking reconsideration of that issue in this proceeding.

[11] This issue is currently before the United States Supreme Court.

[12] *See* Section V, *infra*.

not become acute.[13] Most high-capacity special access circuits are not used to provide local exchange service.

- Qwest has in service today approximately 139,000 special access circuits which are used primarily for the purpose of originating and terminating interexchange calls, and 62,800 private line circuits which are used primarily by large businesses for the purpose of intercommunication among the various premises of the business.[14] The extent of the impact of circuit flipping on Qwest remains consistent with the amounts documented earlier in this proceeding.
- This potential for price arbitrage is especially significant because there is no material difference between a special access circuit and a UNE that is converted from a special access service. In fact, it is conceded in the industry that all that is required to convert a special access circuit to a UNE is a billing change. The Commission has defended its other UNE combination decisions on the basis that there was a significant and material difference between tariffed services and UNEs.[15] There is no such difference in the case of special access tariffed services and special access UNEs.

Furthermore, directing circuit flipping of high capacity special access circuits not used for local exchange service would disrupt investment and competition. Our economic analysis shows that TELRIC prices for high-capacity special access circuits are dramatically less than the cost of special access service installed by anyone – incumbent LEC, competitive LEC or IXC. If

[13] It would be acute, however, if the Commission sought to apply TELRIC pricing to new services, where such action would result in a dramatic reduction in the ability of a company to invest in new services.

[14] See Section III, *infra*.

[15] *See, e.g.*, In the Matter of Access Charge Reform, CC Docket Nos. 96-262, *et al.*, Sixth Report and Order, 15 FCC Rcd. 12962, 13030 ¶ 164 (2000).

a competitive LEC or an IXC can purchase special access circuits well below its own cost of provisioning such circuits, the economic incentive to invest will be destroyed. Moreover, competitive LECs or IXCs which have already invested in facilities would be undercut by the availability of the cheaper UNE facilities. Finally, incumbent LECs would be discouraged from constructing high capacity special access facilities because, once they have been constructed, the incumbent LEC could be forced to sell the facilities at a loss as a UNE. The Act, in establishing the impairment test for UNEs, demonstrated a clear intent that network elements be unbundled only when competition would be advanced by such unbundling.[16] The Commission has recognized this essential premise.[17] In the case of high-capacity special access circuits, ignoring the impairment test would actually tend to undermine the competitive marketplace which has developed over the past years.

## III. THE MARKET FOR HIGH CAPACITY SPECIAL ACCESS CIRCUITS IS COMPETITIVE

We reference herein the new study filed today by USTA on the extent of competition in the high-capacity special access marketplace, the Special Access Report. This document speaks for itself, and we do not repeat here the careful study which went into its preparation. It must be noted that the evidence submitted in this document goes considerably further than what is necessary to answer the questions posed in the Public Notice. The key question now before the Commission is whether the impairment test would support a regulatory regime which permitted competitive LECs and IXCs to "flip" existing high-capacity special access circuits -- loop-transport combinations -- to UNE prices even where the circuits do not carry a substantial amount of local exchange traffic. The conclusions in the Special Access Report are based on

[16] *See* Section IV, *infra*.

[17] *See*, *e.g.*, Third Report and Order, 15 FCC Rcd. at 3701 ¶ 7.

examination of the economics of the high capacity special access market from a broader perspective. The findings in the Special Access Report clearly support continuation of the existing rule which prohibits carriers from flipping circuits which do not carry a substantial amount of local exchange traffic. In the context of this docket, that is all the documents are being offered for. Several critical conclusions cannot be ignored:

- The high-capacity special access market is a separate and distinct market from the local exchange market. The Public Notice asks whether the private line and special access markets are distinct markets.[18] Qwest's experience is that private line services and special access services are the same service, distinguished primarily by the type of purchaser and jurisdiction. In the case of Qwest, private line services are generally intrastate services purchased by large business users, and special access services are generally interstate services purchased by IXCs. Neither of these services fits within the definition of local exchange service. The Commission has long recognized that private line and other services which do not provide universal connectivity within an exchange are not local exchange services under the Communications Act.[19] Thus, in analyzing high-capacity special access circuits under the impairment test of the Act, the Commission properly recognized in the Supplemental Order Clarification that the local exchange market is not the same product market as is the high-capacity special access market.
- The high-capacity special access market is competitive.[20] The vast majority of large business customers, and practically all IXCs, have multiple competitive alternatives

[18] January 24, 2001 Public Notice at 2.

[19] *See, e.g.*, In the Matter of Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Memorandum Opinion and Order, 8 FCC Rcd. 4712 ¶ 2 (1993).

[20] Special Access Report at Introduction and Summary, 2, 7.

available to incumbent LEC high capacity special access circuits.[21] More significantly, there is no competitive LEC whose ability to provide special access service is impaired by the inability to obtain incumbent LEC special access services at UNE prices.

- The statistics on competition, as dramatic as they are, do not take account of one of the major competitive factors in the marketplace today: the ability of IXCs to self-provision special access circuits to end user customers. When a competitive LEC provides special access to an IXC on a common carrier basis, this business operation shows up in the statistics analyzing the availability of common carrier alternatives to IXCs and to end-user customers. When an IXC self provisions the high-capacity point-to-point circuit between the POP and a large business customer, this competitive alternative often does not show up in studies of competition in the special access marketplace. Nevertheless, as the largest IXCs are self-provisioning a very large amount of what would be "special access" service if purchased from either an incumbent LEC or a competitive LEC, self-provisioning in this area by IXCs cannot be ignored.

## IV. FLIPPING A HIGH CAPACITY SPECIAL ACCESS CIRCUIT TO A UNE DOES NOT MEET THE STATUTORY "IMPAIRMENT" TEST

The Commission has interpreted the "impairment" test established in Section 251(d)(2) of the Act as follows:

> [Whether], taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to the element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer. In order to evaluate whether there are alternatives actually available to the requesting carrier as a practical, economic, and operational matter, we look at the totality of the circumstances associated with using an alternative. In particular, our "impair" analysis considers the cost,

[21] Id. at 5-8.

timeliness, quality, ubiquity and operational issues associated with use of the alternative.[22]

The Special Access Report adds yet further credence to the conclusion that this impairment test is not met in the case of competitive LECs desiring to flip tariffed special access circuits not used to provide local exchange service. Substantial and significant alternatives to these special access circuits exist today. There is absolutely no evidence to indicate that the ability of a competitive LEC to provide high-capacity special access service will be materially diminished if it is unable to convert a tariffed special access circuit to a UNE. In fact, there is no evidence that a competitive LEC's ability to provide this service will be impaired at all. While we do not seek here to undertake a full analysis of each of the factors used to determine impairment in these comments, several observations are in order:

- Cost. Given the competitive nature of the high-capacity special access marketplace, there is no economic reason for the cost of UNE special access circuits to be materially lower than what is otherwise available from the myriad of competitive alternatives. In fact, the special access rates for Qwest and its competitors are very much in parity. The fact remains that Qwest's price for special access circuits is materially higher than the calculated theoretical TELRIC cost for those same circuits. We have three observations on this phenomenon:
    - First it is important to note that a cost difference for impairment purposes cannot be based on the difference between TELRIC rates and regulated incumbent LEC tariffed rates. The difference between ILEC special access rates and TELRIC rates for the same service cannot be used under the impairment test for ordering that a special access circuit be flipped to a UNE price.

[22] Third Report and Order, 15 FCC Rcd. at 3704-05.

- Second, TELRIC pricing is particularly inappropriate in the case of new technology such as is represented by high-capacity special access circuits which are not deployed initially on an ubiquitous basis. This is because TELRIC assumes a deployment scope which is never replicated in the case of technologies such as high capacity special access circuits. TELRIC pricing of high-capacity special access circuits and other new technology will always result in under-recovery of costs. As a natural corollary to this proposition, TELRIC pricing of new technology would inevitably retard the ability of incumbent LECs to invest in new technology, as well as inhibit the investment in new technology by competitors.
- Third, the fact that a competitive LEC is already using the circuit to provide service at the tariffed price is conclusive evidence that the cost of the tariffed service does not inhibit the competitive LEC from offering service. It would be a fundamental oxymoron to conclude that the cost of a circuit was too high for a competitive LEC to use in providing service when the competitive LEC is in fact using that precise circuit, at its tariffed price, to provide service today.

- Timeliness. It is true that it is less time consuming to simply make a billing change on an existing circuit than it is to construct a new circuit. However, this fact will always be true no matter who the incumbent is and is irrelevant for impairment analysis. It is always, by definition, less time consuming to retain the existing facility than it is to put in a new facility. If the time consumed by moving to a new facility, service or provider were relevant in the impairment context, the impairment test would become meaningless because moving from an incumbent service would always constitute impairment. But

there is no evidence to show that there is any materially greater timeliness when a competitive LEC or an IXC purchases high-capacity special access circuits from an incumbent LEC than is the case when an alternative provider is used.

- Quality. There is no evidence that incumbent LEC high-capacity special access circuits are of superior quality to competitive LEC circuits. If such a quality differential does exist, it is because of factors unrelated to any incumbent LEC residual market power in local exchange markets.
- Ubiquity. As the Special Access Report demonstrates, the nature of the high capacity special access marketplace is such that alternatives to incumbent LEC special access circuits are available wherever competitive LECs desire to provide special access to customers. And there is no evidence to indicate that, in those areas where CLEC access to the facilities of other competitive LECs is limited, incumbent LEC facilities are in fact available. Incumbent LEC high-capacity special access circuits are generally deployed in the same locations, in the same markets, to the same classes of customers, as are competitive LEC special access circuits. Obviously if an existing incumbent LEC circuit is to be "flipped" to a UNE price, the incumbent LEC circuit is already in place but, as is the case with the "cost" and the "timeliness" parts of the Commission's impairment analysis, the fact that a tariffed service is in place cannot be used as evidence that changing the price of the tariffed service to a UNE price meets the statutory impairment test. The evidence shows that incumbent LECs and competitive LECs are concentrating on the same markets, the same customers and the same geography in marketing high-capacity special access services.

- Operational issues. There is no evidence that competitive LEC network operations based on incumbent LEC special access circuits priced as UNEs will be materially different than if they used any of the competitive alternatives in the market. (or if they continue to pay tariffed rates).
- Goals of the Act. The Commission also determined that a factor to be considered in designating UNEs under the Act is whether such designation furthered the overall goals of the Act. One of the key goals which the Commission undertakes to further in designating UNEs (or in declining to designate UNEs) is whether such designation promotes facilities-based competition, investment and innovation.[23] In the case of flipping high-capacity special access circuits, an FCC rule requiring such flipping would curtail investment in new facilities by incumbent LECs and competitive LECs alike. The high-capacity special access market is rapidly maturing.[24] To establish a regulatory structure whereby one of the many competitors would be required to provide its own facilities to competitors at prices which do not reflect the realities of the marketplace, and which clearly would not support an investment decision by either the incumbent LEC or the competitive LEC, would risk undercutting both competitive LEC investment and investment by incumbent LECs.

Based on the market for high-capacity special access circuits, as analyzed in the light of the statutory impairment requirement, it is quite clear that a competitive LEC cannot make a case that its inability to "flip" an incumbent LEC high-capacity special access circuit to a UNE price will impair its ability to provide special access, exchange access or interexchange service.

---

[23] Third Report and Order, 15 FCC Rcd. at 3745-50 ¶¶ 101-116.

[24] *See* Special Access Report at Introduction and Summary, 2, 5-6.

## V. TELRIC PRICES DO NOT PERMIT REASONABLE COST RECOVERY OF NEW TECHNOLOGY SUCH AS IS REPRESENTED BY INCUMBENT LEC HIGH-CAPACITY SPECIAL ACCESS CIRCUITS

Qwest's high-capacity special access circuits are priced at market rates that reflect the fact that customers have competitive options available should they determine that the Qwest price is too high. Nevertheless, as has been repeatedly noted in this docket, permitting flipping of high capacity special access circuits to UNE prices would create a serious monetary windfall for competitive LECs and cause a financial loss of significant proportions for incumbent LECs. At least in theory, TELRIC costs should begin to resemble market prices for new investment. Because the market-based prices for the high-capacity special access services of Qwest are significantly higher than the TELRIC costs for those same services, Qwest began to study this apparent anomaly in the context of the instant docket.

Attached hereto as Attachment A is a study undertaken of special access tariffed prices (interstate) and TELRIC costs for high-capacity special access UNEs for the state of Colorado. The study shows that the TELRIC cost is generally dramatically lower than the tariffed price of the same circuit. However, a methodology described generically as "incremental cost" which reflects the cost of adding to the existing network generally fits (on average) within the same parameters as the price of the tariffed service. As is explained in the study, the reason the TELRIC costs for high capacity special access circuits are so much lower than market rates for service is fairly simple. TELRIC assumes construction of a complete network at a single point in time to serve the total demand on the network. In the case of the existing network, this approach, while not without challenge,[25] has some rationality because the network is already in place.

[25] In Iowa Utilities Board II, 219 F.3d 744 (8th Cir. 2000), the Eighth Circuit Court of Appeals vacated Section 51.505(b)(1) of the Commission's rules, the section which, among other things,

However, in the case of adding additional circuits to the existing network or meeting a carrier's desire to have access to new technologies that become available, TELRIC pricing is inappropriate. In this instance the network is not in place, and the facilities involved must be constructed. The ILEC would not be building to meet the total demand for the service, only the incremental demand for that service. The existing demand is already being served by existing facilities. Existing customers are currently served by the existing technologies. Any new capacity added to the network must be recovered from just those new customers that use that capacity. Any new technology deployed in the network must be recovered solely from the customers who desire that technology. TELRIC assumes all builds are designed to serve the total demand, not just the incremental increase in demand. In adding to the existing network the economies of scope and scale inherent in the TELRIC method can never be achieved. In an era of rapidly changing and developing technology, no rational business would install a particular type of new technology on a scale sufficient to meet the entire range of existing and potential demand. Installation costs, on a unit basis, are considerably higher when adding to a network than if the entire network is constructed at the same time. Ascribing the economies of scope and scale inherent in the TELRIC methodology to additions of new capacity or technology would result in prices that would deny competitors the incentive to expand their existing facilities.[26] In fact, it would be economically irresponsible for a company to deploy new technology in the manner assumed by the TELRIC rules.

---

supported the concept that all costs must be based on an optimally sized network at all times. When the Supreme Courted granted certiorari in this case, the Eighth Circuit stayed its vacation of this rule pending Supreme Court decision. The case is pending briefing at this time. Qwest is a party to the case.

[26] The Commission paid some recognition to this essential reality when it required that TELRIC costs be calculated based on the actual location of ILEC wire centers, rather than locations where they might have been constructed today.

This phenomenon affects the price of the existing circuits for special access service which ILECs would have converted to UNE prices. These facilities are generally installed on an incremental basis and they share the cost characteristics described here even though the particular facilities are not in place.

We do not in this docket request that the TELRIC rules be modified to reflect the reality of the cost of deploying new technologies and/or capacity in the existing network. In this particular docket, it is sufficient that the FCC simply continue to apply the impairment test to high-capacity special access circuits. Modifying these rules would, of course, require that anomalies in the TELRIC rules be examined here as well. However, this analysis is important in this docket because it refutes a common myth about TELRIC and new technology. The differential between Qwest's tariffed special access rates and TELRIC rates for the same service is based on a flaw in TELRIC costing when applied to deploying new technology, not on any overpricing of Qwest's special access services.

## VI. QWEST HAS COMPLIED WITH THE SUPPLEMENTAL ORDER CLARIFICATION

Some concern has arisen that Qwest and other ILECs are not responding to CLEC requests that combinations of high capacity loops and transport which do carry substantial amounts of local exchange traffic be "flipped" to UNE prices. As has been noted, such "flipping" essentially involves, from the perspective of the CLEC, a reduction in the price paid with no other change in the actual service.[27] The primary source of information that CLECs are dissatisfied with Qwest's processing of its requests that circuits be flipped to the UNE price is a

[27] From Qwest's perspective, however, the process of flipping a circuit also involves moving the service to a different provisioning system and a different billing system process can be substantially disruptive to Qwest. This process can be substantially disruptive to Qwest.

letter filed on December 22, 2000 by the Association for Local Telecommunications Services (ALTS). In a letter filed today with the Commission signed by Melissa Newman, Vice President - Federal Regulatory), Qwest has responded to these criticisms of its processing of legitimate circuit flipping requests. A copy of Ms. Newman's letter is attached hereto as Attachment B.

It is important to note that the complaints lodged by members of ALTS concerned requests for the flipping of circuits that were often in contravention of the Commission's rules. ALTS has a right to request that the Commission's rules be changed. ALTS does not, however, have the right to contend falsely that Qwest is either violating the Commission's rules or, as ALTS puts it, exhibiting "ILEC intransigence in converting special access circuits to EELS." The implication in the ALTS letter that Qwest is not acting in accordance with the FCC's rules is simply untrue.

## VII. COMMINGLING OF SPECIAL ACCESS TARIFFED SERVICES AND UNES WOULD OBLITERATE THE DISTINCTION BETWEEN TARIFFED SERVICES AND UNES

The Public Notice asks for comment on the issue of what is called "commingling:" "[I]f a requesting carrier converts special access circuits to combinations of unbundled network elements, we ask parties to comment on whether such circuits may remain connected to any existing access service circuits without regard to the nature of the traffic carried over the access circuits."

This "commingling" issue presents itself in two variations. First, a CLEC could simply direct that an end-to-end circuit be designated as part UNE and part tariffed service. That is, an end-to-end circuit supplied entirely by the ILEC would be priced to maximize the arbitrage between the price of tariffed services and the price of UNEs. Second, a UNE high capacity loop

could be connected to high capacity transport and the same facility is used to provide both UNE transport and tariffed transport. While both of these scenarios raise similar issues, they merit separate treatment.

In the case of the first scenario, interconnection of a tariffed channel termination and UNE transport, the answer is fairly simple. The entire circuit looks exactly like a special access circuit. There is no basis in law or logic to allow a single circuit to be artificially bisected in this manner. We do note, however, that there is nothing that prohibits a CLEC from connecting an ILEC tariffed service to a UNE obtained from the ILEC within the CLEC's collocation space. The question here is limited to whether a CLEC is entitled to order two pieces of a special access circuit be combined by the ILEC and then priced in the bifurcated manner which commingling envisions. The answer to this question is clearly no.

A slight complexity is put into the equation when the commingling is represented by connection of both a tariffed special access channel termination and a UNE loop to a single transport facility which has been multiplexed by the ILEC into individual channels. In this situation the channel terminations would remain separate (UNE and tariffed) depending on whether they carried a substantial amount of local exchange traffic. But the interoffice transport facilities and multiplexer would be commingled tariffed and UNE facilities carried over a single ILEC supplied and controlled high capacity circuit. In this type of a commingling situation, the CLEC would have purchased the entire transport circuit as a tariffed circuit and would then have the ILEC connect the UNE high capacity loop to that transport. While somewhat more subtle than the first configuration, this configuration likewise results in having the ILEC provide a single circuit which is priced based upon an artificial split in the circuit between UNE prices and tariffed prices. We submit that, in this situation as well the first, any such split in a single

channel or circuit between the two pricing methodologies would simply be arbitrary and capricious. In a world where, as the Act requires, UNEs need be unbundled and priced at regulated TELRIC costs only when the failure to unbundle them would impair the ability of a carrier to provide the service it desires to offer, it is inconceivable that a scenario would unfold where the ability of a carrier to connect a half circuit UNE to a half circuit tariffed service would conform to the terms of the Act.

We emphasize here that we are not contending that a carrier cannot connect a UNE to a tariffed service. When a carrier does this, the carrier is simply using UNEs and tariffed services which it has purchased. The commingling issue occurs only when a CLEC seeks to have the ILEC combine a UNE and a tariffed service, without the intervention of a CLEC premise or CLEC equipment or to retain such a combination when a circuit is flipped. In these circumstances, where the ILEC is actually provisioning the end-to-end service, "commingling" the tariffed service and the UNE is improper under the Act.

## VIII. THE COMMISSION'S CONCLUSION THAT THE IMPAIRMENT STANDARD APPLIES ON A MARKET-BY-MARKET BASIS IS CORRECT

As a final matter, CLECs requesting the right to flip high capacity special access circuits to UNE prices have generally argued that, once it has been determined that a particular element meets the impairment test for some services—i.e., if the high capacity loop-transport combination meets the impairment test for the provision of local exchange service -- then a carrier is entitled to purchase that element at UNE prices and use it for the offering of a service for which the element does not meet the impairment test. For the most part, we will examine any legal arguments which are raised in this regard in our reply comments. However, in these opening comments we set forth very briefly some basic legal principles.

- The Act's impairment standard is quite clearly service specific. Section 251(d)(2)(B) of the Act establishes the impairment standard, and the impairment showing which a CLEC must make applies to "the service that it [the CLEC] seeks to offer." The only logical conclusion which can be drawn from this statutory language is that a CLEC which obtains a UNE for a purpose which has met the impairment standard must use the UNE for that purpose. This is a vital point. The impairment test stands at the heart of the Act, and allowing a CLEC to demand UNEs for services which do not meet this test would be in direct contravention of the Act.
- The Supplemental Order Clarification, by relying on a test based on substantial local exchange traffic, grants CLECs flexibility to permit some limited ancillary use of a UNE for the provision of services which do not meet the impairment standard, thus eliminating any argument that the inability of a CLEC to make some ancillary use of a UNE for services not directly authorized under the Act itself would impair the CLEC's provision of local exchange service.
- The Commission has express authority under Section 251(c)(3) of the Act to impose "just and reasonable" conditions on UNEs. Such conditions would include any conditions which the Commission reasonably determined were necessary or proper to protect the public interest and to further the purposes of the Act. Given that circuit flipping of ILEC high capacity special access circuits would tend to undermine the Act by disrupting competition and investment, this statutory authority provides an independent basis on which to decline to require ILECs to convert existing special access circuits to UNE prices.

- Finally, Section 251(g) of the Act quite plainly continues the existing access charge regime for special access services until such time as the Commission modifies it. The Commission has the authority under this section of the Act to simply continue the current structure whereby special access services used to provide exchange access service or special access services must be purchased pursuant to ILEC tariffs, not as UNEs.

Our basic point is very simple. There is nothing in the Act which grants CLECs the right to demand that any UNE be made available to them in order to provide services which do not meet the impairment test. The Commission has ample authority, not only under the impairment section of the Act (which is binding on the Commission) but other sections of the statute as well, to ensure that CLECs are not able to use UNEs as an arbitrage device in a manner which contravenes Section 251(d)(2)(B) of the Act.

## IX. CONCLUSION

The Commission should recognize that the impairment standard of the Act precludes CLECs from obtaining high capacity special access services at UNE prices, at least unless these circuits carry a substantial amount of local exchange traffic.

Respectfully submitted,

QWEST CORPORATION

Robert B. McKenna
Sharon J. Devine
Robert B. McKenna
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Its Attorneys

April 5, 2001

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION IN RESPONSE TO PUBLIC NOTICE** to be filed with the FCC via its Electronic Comment Filing System, and a copy of the **COMMENTS** to be served, via hand delivery, on all parties listed on the attached service list.

Ross Dino
Ross Dino

April 5, 2001

Michael K. Powell
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Gloria Tristani
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Harold Furchtgott-Roth
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Janice Myles **(2 copies)**
Policy & Program Planning Division
Federal Communications Commission
Room 5-C327
Portals II
445 12th Street, S.W.
Washington, DC 20554

Dorothy T. Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
5th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Jody Donovan-May
Federal Communications Commission
Policy and Program Planning Division
Room 5-C313
Portals II
445 12th Street, S.W.
Washington, DC 20554

Tom Navin
Federal Communications Commission
Policy and Program Planning Division
Room 5-C142
Portals II
445 12th Street, S.W.
Washington, DC 20554

International Transcription
Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

# COST ISSUES ASSOCIATED WITH SPECIAL ACCESS CONVERSION TO UNEs

As has been noted previously, there is a dramatic difference between TELRIC costs for high capacity special access circuits and the tariffed rates for those same circuits. The purpose of this study is to determine why this differential exists, especially whether this differential is the result of the overpricing of special access services by Qwest, or the result of some flaw in TELRIC methodology as applied to high capacity special access circuits, or some other cause. The study compared interstate special access rates with Qwest TELRIC studies for the state of Colorado.

Appropriate Measures of Special Access Cost

Given that the rate of return of the Special Access basket is not the appropriate measure of cost, the question presented is why, an economic forward-looking cost such as TELRIC + Common (as used for UNEs) is not the appropriate measure? TELRIC + Common costs, as well other TSLRIC studies, assume the replacement of the entire network. This assumption provides the most efficient network configuration for equipment and cable sizing for a single point in time. However, as soon as new business park development occurs or development patterns change in a serving area, the latest TELRIC study or TSLRIC study is no longer the most efficient network. This occurs because the TELRIC studies are designed to efficiently serve the known existing demand and recognize all the economies of scope and scale in serving those locations. However, once that theoretical network is in place, those economies do not extend beyond the reach of that network. Any service demand beyond the quantities and locations reflected in the TELRIC study create much higher incremental costs to place equipment and facilities to provide those services.

Assuming the goal of the cost study is to calculate the cost to meet future increases in demand for Special Access services and the demand for new technology, the appropriate cost measure is an incremental forward-looking economic cost that reflects the cost of placing equipment and facilities to serve incremental service demand beyond the existing network. This methodology is the appropriate cost measure to determine the reasonableness of the Special Access rates. Exhibit 1 compares composite Special Access Rates for some major service categories.

- The first column is the current weighted[1] interstate special access rate the category;
- The second column is the TSLRIC plus network support cost for the service. This cost represents the direct costs of total network replacement for the service plus recovery of the attributable network support costs. The direct costs include product management, sales expense, and business fees. This column utilizes economic cost of money and depreciation lives in the cost calculation.

[1] The monthly rates were weighted by rate zone demand and additionally the fixed and per mile elements were weighted by the mileage band demand.

- The third column is the TELRIC cost of the service plus recovery of a reasonable share of common costs. The TELRIC cost is based on total network replacement for the service, just as TSLRIC does. The TELRIC costs include the direct costs and attributable network support costs plus general support costs, general and administrative costs and executive and planning costs. This column utilizes Colorado prescribed cost of money and depreciation lives in the cost calculation.
- The fourth column uses the same cost structure as the third column but utilizes the economic cost of money and depreciation lives.
- The fifth column is a LRIC cost of the service of serving an incremental service demand beyond the capabilities of the existing network. The cost includes the direct, attributable and common costs in the same manner as the TELRIC columns. It is a LRIC cost which is based on more realistic deployment assumptions than appear in TELRIC or TSLRIC for new investment of this type. This column utilizes the Colorado prescribed cost of money and depreciation lives.
- The sixth column uses the same LRIC cost structure as the fifth column. This column utilizes economic cost of money and depreciation lives.

Exhibit 1 demonstrates the current Special Access rates are relatively close to the LRIC cost of providing the Special Access service based on realistic deployment assumptions. These costs are more closely aligned to the costs Qwest incurs in meeting the demand for new Special Access services and technologies as well as increases in the capacity of the network. If the Commission were to allow the conversion of Special Access to UNE rates, the costs which are properly recovered by those Special Access rates will not be recovered.

# Special Access to UNE Conversion Assumptions

**DS1**
**Loop Facilities**

DS1s are provided over both copper and fiber loop facilities. In the incremental study, the size (number of cable pairs) of the copper feeder cable was reduced to represent the incremental reinforcement of feeder cable. The average feeder cable size used in a total network replacement study under TELRIC assumptions was divided by 3 and rounded up to the next available cable size. For example, a 2,400 pair cable was divided by 3 to equal 800 pairs cable. However, cable equipment vendors do not offer an 800 pair cable. The incremental study uses the next available cable size, which in this example is a 900 pair cable. The incremental study used smaller copper cables using this methodology to derive the cable size and cable utilization ranging from 55% to 65% depending on wire center density. For the DS1 technologies provided on fiber loop facilities, the Incremental Model utilized fiber feeder configured as a 12-strand fiber cable and a utilization of 33%. In contrast, the TELRIC Model uses a mix of fiber cable sizes, depending upon the total system demand at each segment of the feeder network.

**Inter-Office Facilities**

All inter-office facilities were configured as "Point to Point". The TELRIC total network replacement Model utilizes SONET system sizes that are a mixture of OC12 and OC48 equipment. The Incremental Model utilizes SONET systems that are a mix of OC3 and OC12 Equipment. In the Incremental Model the OC3 SONET equipment was weighted 55% and the OC12 was weighted 45%. The TELRIC Model weights OC12 at 30% and OC48 at 70% in equivalent inter-office configurations. Additionally, the fills on the OC3 electronics were adjusted to 50% in the Incremental Model, from fills ranging between 70% to 74% in the TELRIC Model. The OC12 and OC48 SONET equipment in both Models require M1/3 equipment to deliver DS1 service. The OC3 SONET equipment has DS1 cards or ports and does not require M1/3 equipment.

**DS3**
**Loop Facilities**

The DS3 technologies are all provided on fiber loop facilities. The Incremental Model utilized fiber feeder configured as a 12-strand fiber cable and a utilization of 33%. In contrast, the TELRIC Model uses a mix of fiber cable sizes, depending upon the total system demand at each segment of the feeder network.

**Inter-Office Facilities**

All inter-office facilities were configured as "Point to Point". The TELRIC total network replacement Model utilizes SONET system sizes that are a mixture of OC12 and OC48 equipment. The Incremental Model utilizes SONET systems that are also a mix of OC12 and OC48 equipment. In the Incremental Model the OC12 SONET equipment is

weighted 50% and the OC48 was weighted 50%. The TELRIC Model weights OC12 at 30% and OC48 at 70%.

**OC3**
**Inter-Office Facilities**

All inter-office facilities were configured as "Point to Point". The TELRIC total network replacement Model utilizes SONET system sizes that are a mixture of OC12 and OC48 Equipment. The Incremental Model also utilizes SONET systems that are a mix of OC12 and OC48 Equipment. In the Incremental Model, the OC12 SONET equipment is weighted 30% and the OC48 is weighted 70%. The TELRIC Model weights OC12 at 20% and OC48 at 80%.

**~~Exhibit 1~~**

**~~COLORADO SPECIAL ACCESS UNE CONVERSION~~**

| ~~SERVICE~~ | Current FCC SPECIAL ACCESS RATE (MONTHLY) | FCC Cost = TSLRIC + Network Support | TELRIC + Common (Prescribed) | TELRIC + COMMON (Economic) | INCREMENTAL COST (Prescribed) | INCREMENTAL COST (Economic) |
|---|---|---|---|---|---|---|
| DS1 CHANTERM | $ 126.43 | $ 87.59 | $ 91.12 | $ 104.37 | $ 116.08 | $ 137.06 |
| DS1 FIXED | $ 96.07 | $ 32.92 | $36.70 | $42.80 | $ 49.07 | $ 57.18 |
| DS1 PER MILE | $ 14.32 | $ 1.64 | $1.29 | $1.53 | $ 11.68 | $ 13.92 |
| DS3 CHAN TERM | $ 1,500.00 | $ 806.99 | $ 1,036.67 | $ 1,190.16 | $1,405.68 | $1,670.93 |
| DS3 FIXED | $ 336.92 | $ 208.25 | $231.64 | $269.84 | $275.03 | $320.37 |
| DS3 PER MILE | $ 46.20 | $ 23.99 | $24.78 | $26.49 | $34.43 | $40.97 |
| OC3 FIXED | $ 650.00 | $ 484.28 | $541.68 | $630.90 | $872.72 | $1,016.42 |
| OC3 PER MILE | $ 103.67 | $ 100.99 | $101.02 | $119.76 | $98.47 | $117.40 |


**Qwest**
1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3123
Facsimile 202.296.5157

**Melissa E. Newman**
Vice President-Federal Regulatory

Ex Parte

April 5, 2001

Jodie Donovan-May
Federal Communications Commission
Common Carrier Bureau
445 – 12th Street, S.W.
5th Floor
Washington, D.C. 20554

RE: *Ex Parte* regarding Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket: 96-98

Dear Ms. Donovan-May:

Prior to the Industry Joint Meeting held in February to discuss operational issues involving the conversion of special access circuits to enhanced extended links (EELS), ALTS presented the Commission with a list of alleged difficulties experienced by some CLECs in their efforts to obtain EELs. This letter responds to the specific issues cited in the ALTS *ex parte* document regarding CLEC requests for conversions of special access services to EELs in Qwest's region.

Qwest has worked with diligence to assure compliance with the FCC's *Supplemental Order Clarification.* The requirements and processes associated with requesting conversions of special access circuits to EELs are well documented on Qwest's Website (www.qwest.com/wholesale/pcat/eel.html#), and Qwest has spent countless hours assisting CLECs in their efforts to submit conversion requests. It has been Qwest's experience that most of the delays and refusals in processing orders have resulted from CLEC misinterpretation of EEL requirements that resulted in improper conversion requests as well as errors

in the information submitted by CLECs. Incorrect or incomplete circuit information, failure to certify that the circuits satisfy one of the Commission's three "significant amount of local exchange service" standards and requests that would improperly result in commingling of UNEs and tariffed services explain the majority of the delays, not "foot dragging, gamesmanship and intransigence" as claimed by ALTS. Qwest believes many of the claims made by ALTS in its *ex parte* represent grievances concerning policy decisions made by the Commission rather than true operational difficulties.

Following is Qwest's response to the specific issues raised in the ALTS *ex parte*:

**Avista:**
*Issue: Avista serves Tier 3 and 4 markets in the Northwest. Avista cannot obtain EELs although it has heard promises from Qwest that it will make EELs available.*
*Response:* Although Avista has asked for and received information regarding the pricing of EELs, the Qwest Account team has no record of a request for EELs from Avista.

**e.spire:**
*Issue: Qwest requires a "pre-audit" even when the CLEC has submitted a self-certification letter.*
*Response:* Using the Spreadsheet Template submitted by the CLEC (see step 4, below), Qwest verifies the information provided to assure accurate conversions of qualifying circuits. This pre-qualification process serves to determine whether the CLEC has provided accurate circuit ID and/or BAN numbers and end-user address information, whether they have certified to a local service option and assures that the requested conversion does not involve the commingling of UNE and tariffed services. This is not an audit. Rather, the template and the pre-qualification process serve to ensure compliance with the FCC's June 2 order addressing certification (paragraph 29) and commingling (paragraph 28), to provide information that could be used in the future to audit for compliance with the local service requirement, and to make sure that the circuit ID that the CLEC submits is the circuit that goes to the identified end user.

As described on the Qwest Wholesale Products and Services Website (URL: http://www.qwest.com/wholesale/pcat/eel.html#), following are Qwest's EEL-C process steps:

The Co-Provider must:
1. Provide a signed Interconnect Contract Amendment.
2. Submit a revised Product Questionnaire (this assures billing element changes are made to accomplish billing for the EEL-C).
3. Complete the Certification Letter and return it to their Qwest Account Manager.

4. Complete and return the Spreadsheet Template, which identifies the circuits to convert, to their Qwest Account Manager.

*Note: Templates for all of these documents are provided on the website.*

Using the Certification Letter and Spreadsheet Template, Qwest will perform the Circuit Validation and Pre-Qualification verification. This verification will determine whether:

1. The circuit exists in Qwest billing records
2. The end user name and address on the spreadsheet match that on the Qwest billing records
3. If certified under Option 1 or 2, the circuit involves collocation
4. The circuit will be connected to a Qwest tariffed service, otherwise known as "commingling." If the circuit is connected to a tariffed service, conversion will not be allowed.

Upon completion of the circuit validation and pre-qualification validation, Qwest will provide to the Co-provider a validation code for circuits that qualify.

Once rates are loaded in the billing system and Qwest has provided a validation code, Co-provider may place orders.

*Issue: Qwest looks to e.spire's multiplexed DS3 in determining whether "significant amount of local exchange service" exists under tests laid out in the Supplemental Order Clarification.*

*Response:* Qwest's actions are consistent with Paragraph 28 of the *Supplemental Order Clarification*: "We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above." Paragraphs 22 (2) and (3) of the *Supplemental Order Clarification* refer specifically to DS3 circuits: "...When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet this criterion." This is an old issue that Qwest has previously responded to in a written *ex parte* filed with the Commission on September 29, 2000. (Copy attached).

**Electric Lightwave, Inc.**

*Issue: Qwest is incorrectly defining a special access DS1 channel termination (loop) that passes through a Qwest provided M 1/3 multiplexer before terminating in an ELI collocate as an EEL subject to the "significantly local" certification process.*

*Response:* Qwest has recently agreed to provide a "loop/mux-only" UNE-C for the conversion of a loop terminating onto a multiplexer and then directly into the CLEC's collocation space in the same serving wire center. Requests for this type of conversion do not require a "significantly local" certification.

*Issue:* *Qwest requires that new EELs be certified under one of the FCC significantly local options, although Qwest has been obligated to provide EELs as a new combination, separate and apart from the EEL Clarification Order.*
*Response:* In paragraph 4 of the *Supplemental Order* issued November 24, 1999, the FCC makes it clear that the ILECs may restrict the use of EELs: "..we modify our conclusion in paragraph 486 to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements in this Order". Qwest believes the certification requirement regarding local traffic applies to all EEL requests irrespective of their "new" or "conversion" status.

*Issue:* *Qwest refuses to convert qualifying circuits to EELs in situations that result in EELs and special access circuits riding on the same transport facility or passing through the same multiplexed system. Being required to segregate circuits on facilities that carry only EELs and UNEs is terribly inefficient.*
*Response:* ELI is seeking to commingle traffic, which is specifically not required per Paragraph 28 of the *Supplemental Order Clarification:* "We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above."

*Issue:* *ELI proposed that in lieu of requiring separate facilities for EELS and special access that Qwest simply ratchet the special access transport facility bills to reflect the lower prices for the percentage of facilities being utilized for EELs.*
*Response:* Qwest is complying with Paragraph 28 of the *Supplemental Order Clarification.*

*Issue:* *Another factor that carries significant weight in the EEL conversion equation is the assessment of termination liabilities for special access circuits currently under term discount plans. Qwest has refused to forgive or even adjust termination liabilities associated with converting existing special access circuits to UNEs. Qwest wants to extract huge termination liabilities from CLECs as if the CLECs were dropping Qwest's service altogether. That's clearly not the case. The CLECs will still be purchasing services from Qwest, just at a price that would allow the CLEC to compete. The FCC should mandate that no termination liability charges are to be assessed to CLECs converting circuits to UNE pricing. Especially given that CLECs are just now getting access to the UNE pricing that they have been legally entitled to since February 1996, and even earlier in some states*
*Response:* This reveals the pricing arbitrage issue for what it is. The CLEC simply wants to pay less for the exact same service. Term Discount plans are

tariffed offerings that allow lower unit pricing in exchange for a CLEC's commitment to purchase those tariffed services over a specified period of time. The termination liabilities exist in order to make the ILEC "whole" in the event a CLEC terminates its agreement earlier than planned for any reason. TLA (termination liability assessment) also recovers the costs an ILEC incurs to build the facility for the CLEC. Since CLECs are not required to commit to purchasing the service for an extended period of time once it has been converted to UNEs, an ILEC cannot be assured of recovering its construction costs. TLA provides the cost recovery mechanism. If an ILEC were unable to recover its cost to construct facilities, eventually, this cost would be passed to the ratepayer. To "forgive" the termination liabilities and then provide the exact same service at UNE rates would penalize the ILEC and its customers.

*Issue: Qwest requires ELI to complete a new questionnaire, for each state, to trigger Qwest internal processes for loading rates in its billing system even though all the rates are already in the interconnection agreement. This unnecessary step imposed by Qwest only causes further delay. Qwest received ELI's completed questionnaires on September 9, 2000 and has not yet completed the billing system updates for ELI.*
*Response:* The Qwest questionnaire allows a CLEC to indicate which states the requested billing changes should be applied to, and they may submit one form for multiple states by checking a box on the form for each applicable state. The information provided on the questionnaire is required to establish billing for any new element and offering. Qwest's records indicate ELI's completed questionnaires were received on September 18, 2000 and were submitted for billing system updates. Had ELI provided complete certification and spreadsheet information to enable Qwest to perform its pre-qualification, an effective billing date (EBD) would have been offered to ELI upon completion of the pre-qualification, irrespective of the status of the billing system updates.

**Jato**
*Issue: Qwest simply refuses to offer EELs to CLECs for any other use than local voice service. Qwest has maintained in the CO 271 proceeding that the FCC's EEL Orders make it clear that an EEL can never be used in substitution for a special access/private line arrangement. They refuse to acknowledge the IXC distinction written into the Clarification Order or the plain language of the Act.*
*Response:* Qwest policy regarding EELs is consistent with the terms of the *Supplemental Order Clarification*. A carrier may use an EEL as a substitution for a special access/private line arrangement subject to its certification that the circuit in question carries "significant local traffic" as described in the *Order.*

**XO**

*Issue: In the Qwest region, XO has encountered many of the same restrictions and limitations regarding conversion of existing access circuits to EELs and ordering new EELs described above by Electric Lightwave, Inc.*

*Response:* On March 9, 2001 XO requested the conversion of 26 circuits. Qwest is currently in the process of pre-qualifying these circuits for conversion.

**Generic Issue**

*Issue: Qwest is attempting to expand the scope of the FCC's Supplemental Orders concerning EELs, by including the following language In its interconnection agreement terms and conditions for dark fiber UNEs:*

> *[CLEC] shall not use UDF [Unbundled Dark Fiber] as a substitute for special or switched access services, except to the extent [CLEC] provides 'a significant amount of local exchange traffic' to its end users over the UDF as set forth by the FCC.*

*Response:* If dark fiber is ordered as a stand-alone UNE rate element, for example, as Unbundled Dark Fiber Inter office (UDF IOF) between two wire centers, Qwest does not require a certification as to "a significant amount of local exchange traffic". However, if Extended Unbundled Dark Fiber (E-UDF) or Extended Unbundled Dedicated Inter office (E-UDIT), elements that are equivalent to entrance facilities, are ordered, Qwest maintains the local exchange traffic requirement, consistent with the terms of the *Supplemental Order Clarification*.

Qwest remains committed to complying with the terms of the Commission's Order and working with CLECs to resolve issues that arise as the result of conversion requests. We will continue to cooperatively address issues as they arise. Please contact me if you have questions regarding this issue.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, an original and two copies of this letter in being filed with the Office of the Secretary for inclusion in the record of this proceeding.

Sincerely,

Melissa E. Newman

Melissa Newman

SHL

RECEIVED

SEP 29 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ride the light

Qwest.

Qwest
1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3120
Facsimile 202.296.5157

Melissa E. Newman
Vice President-Federal Regulatory

September 29, 2000

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Written *Ex Parte* Statement of Qwest Corporation, Inc. in Response to Written *Ex Parte* Statement of e.spire Communications, Inc. Regarding the Conversion of Special Access Circuits to Unbundled Network Elements in CC Docket 96-98

Dear Ms. Salas:

The purpose of this ex parte is to respond to the letter filed by e.spire Communications, Inc. ("e.spire") on September 7, 2000 complaining that Qwest[1] is refusing to convert unbundled network elements ("UNEs") that will be combined with its tariffed special access services. Apparently, e.spire believes Qwest must allow unbundled loop-transport combinations to be combined with its tariffed special access services or be willing to perform any necessary "regrooming" of e.spire's facilities at no charge. Qwest believes that e.spire's demand does not comport with the Commission's June 2, 2000 *Supplemental Order Clarification* in CC Docket No. 96-98, FCC 00-183 or the definition of a UNE under Section 251(c) of the 1996 Act.[2]

The Commission established clear guidelines on the conversion of unbundled loop transport combinations in its *Supplemental Order Clarification.* In particular, the Commission found that the three options for satisfying the "significant amount of local exchange service" requirement presented in a February 28, 2000 Joint Letter submitted by a coalition of Incumbent Local Exchange Carrier's (ILEC's) (including Qwest) and

[1] On June 30, 2000, U S WEST, Inc., the parent and sole shareholder of U S WEST Communications, Inc., merged with and into Qwest Communications International Inc. Further, on July 6, 2000, U S WEST Communications, Inc. was renamed Qwest Corporation.

[2] 47 U.S.C. Section 251(c).

Competitive Local Exchange Carrier's (CLEC's) represented a reasonable compromise and adopted them as a safe harbor. Each of the three local usage options endorsed by the Commission "does not allow loop-transport combinations to be connected to the ILEC's tariffed services."

Indeed, the Commission expressly rejected the suggestion that it eliminate the prohibition on "combining loops or loop-transport combinations with tariffed special access services" in the local usage options. The Commission was concerned that removing this prohibition could lead to the use of unbundled network elements by carriers solely or primarily to bypass special access services. Although the Commission referred to the combination prohibition as a "commingling" prohibition, that term is somewhat misleading because there is no prohibition on the type of traffic that can be carried over an ILEC's tariffed special access services. Rather, the Commission confirmed that an ILEC may prohibit UNE loop-transport combinations from being combined with its tariffed transport service.

What e.spire is seeking to do is convert only the DS1 portion of its special access service to unbundled DS1 circuits at UNE rates. In e.spire's current configuration, all of the DS1 circuits it is requesting to convert to UNE rates are connected to tariffed DS3s which are not eligible for conversion under the *Supplemental Order Clarification*. Therefore, in e.spire's requested configuration, these unbundled DS1 circuits would be combined with Qwest's tariffed DS3 special access services. Fundamentally, a rule that would require an ILEC to combine UNE loop-transport combinations with its tariffed transport service in this manner would be contrary to the entire UNE structure, as it would simply create a new tariffed service at a lower price. A special access service is a point-to-point service. If an ILEC provides a UNE loop "facility" from the customer premises to a wire center and connects that facility directly to its tariffed point-to-point special access service between a wire center and another premises (or Point of Presence), the result is simply a unified special access service between the two end points. The only difference would be the price of the service. Clearly, tariffed special access services are not UNEs, and carriers purchasing special access services must pay the tariffed rate for the service.

Further, if the Commission were to define a new UNE consisting of a UNE loop connected by the ILEC to the ILEC's tariff special access circuit, that UNE would not satisfy the impairment standard for unbundling set forth in Section 251(d)(2) of the 1996 Act. As discussed above, the end-to-end circuit would be nothing more and nothing less than a special access circuit. It would be essentially circular to claim that failure to obtain access to a special access circuit impeded competition when that same special access circuit already is available -- under tariff -- as required by the Commission. It should also be noted that requiring ILECs to combine UNEs and tariffed services on behalf of requesting carriers would directly contravene the Eighth Circuit's recent decision[3] reaffirming that the Commission does not have the authority to mandate UNE combinations.

[3] Iowa Utils. Bd. v. FCC, 219 F.3d 744 (D.C.Cir. 2000).

It should not be surprising that carriers such as e.spire might need to reconfigure their legacy networks in order to take advantage of the rate reductions available under the *Supplemental Order Clarification.* However, the fact that e.spire has chosen to provide local exchange service using Qwest's federally tariffed special access services does not mean it is entitled to have Qwest regroom these circuits for free. If anything, this shows that carriers can provide competitive local service without receiving access to loop-transport combinations at UNE rates. In any event, Qwest's federally tariffed regrooming rate of $122.50 per circuit provides a cost-efficient means for e.spire to reconfigure its network consistent with the *Supplemental Order Clarification.* For example, in one Central Office e.spire could regroom 67 DS1 circuits at a cost of $8,207.50 and receive the benefit of $10,176 in savings off the monthly tariffed rate for these circuits. *That means e.spire would recover the cost of regrooming the 67 circuits in just 25 days, and the savings would continue as long as the circuits are in service.* (See Attachment 1) e.spire would experience additional savings after it regrooms because it would have to convert the DS3s that carry the UNE-C DS1s to combinations, thereby receiving the benefit of UNE rates. Moreover, once this one-time regrooming is performed, e.spire would be in a good position to add new local service customers using UNE loop-transport combinations.

In summary, there is no basis for e.spire's demand that Qwest reconfigure its existing network at no charge to facilitate the conversion to UNE rates. Qwest reasonably expects that e.spire should be willing to pay the relatively modest cost of regrooming its existing circuits in order to take advantage of the significant rate reductions available under the *Supplemental Order Clarification.*

Sincerely,

Melissa E. Newman

Melissa E. Newman
Vice President-Federal Regulatory
Qwest

**Attachment 1**
**Qwest *Ex Parte***
**September 28, 2000**

Regrooming example:
Specific circuit information withheld to protect proprietary customer information.

**ILLUSTRATIVE, NOT INTENDED TO REPRESENT MOST EFFICIENT REGROOMING**

| Tariffed DS3 | Used channels on | Current configuration # DS1s | Current configuration Status | Regroomed configuration # DS1s | Regroomed configuration Status | Regroomed configuration # Regrooms |
|---|---|---|---|---|---|---|
| X01 T3 | 16 | 7 | Tariffed | 0 | Tariffed | 0 |
| | | 9 | UNE-C | 15 | UNE-C | 6 |
| X02 T3 | 12 | 10 | Tariffed | 17 | Tariffed | 7 |
| | | 2 | UNE-C | 0 | UNE-C | 0 |
| X03 T3 | 24 | 13 | Tariffed | 13 | Tariffed | 0 |
| | | 10 | LIS | 10 | LIS | 0 |
| | | 1 | UNE-C | 0 | UNE-C | 0 |
| X04 T3 | 7 | 1 | Tariffed | 24 | Tariffed | 23 |
| | | 6 | UNE-C | 0 | UNE-C | 0 |
| X05 T3 | 19 | 8 | Tariffed | 0 | Tariffed | 0 |
| | | 11 | UNE-C | 23 | UNE-C | 12 |
| X06 T3 | 17 | 12 | Tariffed | 12 | Tariffed | 0 |
| | | 5 | UNE-C | 0 | UNE-C | 0 |
| X07 T3 | 22 | 15 | Tariffed | 0 | Tariffed | 0 |
| | | 7 | UNE-C | 26 | UNE-C | 19 |
| X08 T3 | 17 | 9 | Tariffed | 9 | Tariffed | 0 |
| | | 8 | UNE-C | 0 | UNE-C | 0 |
| X09 T3 | 20 | 16 | Tariffed | 16 | Tariffed | 0 |
| | | 4 | UNE-C | 0 | UNE-C | 0 |
| X10 T3 | 22 | 16 | Tariffed | 16 | Tariffed | 0 |
| | | 6 | UNE-C | 0 | UNE-C | 0 |
| X11 T3 | 20 | 16 | Tariffed | 16 | Tariffed | 0 |
| | | 4 | UNE-C | 0 | UNE-C | 0 |
| X12 T3 | 21 | 20 | Tariffed | 20 | Tariffed | 0 |
| | | 1 | UNE-C | 0 | UNE-C | 0 |

| Total # DS1s | |
|---|---|
| Tariffed | 64 |
| LIS | 10 |
| UNE-C | 143 |
| Total | 217 |

**In the regroomed configuration there are no DS3s that carry both UNE-C and Tariffed services. The pure DS3s that carry only UNE-C DS1s can (and must) be converted to UNE-C so that "their" DS1s can be converted.**

| | |
|---|---|
| Total DS1s regroomed | 67 |
| FCC regroom rate | $ 122.50 |
| Total regroom charges | $ 8,207.50 |

| | |
|---|---|
| Approx conversion savings | $10,176 per DS1, based on all circuits requested to be converted |
| Payback period | 25 calendar days, based on a 31 day month |